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IN THE

Supreme Court of the United States

October Term, 1989

JAMES J. CORRIGAN, JR., SALVATORE AVELLINO, VITO BIONDO, CHARLES CANNIZZARO, NICHOLAS FERRANTE, PETER FINNERTY, JOHN HAYNES, VINCENT MONTESANO, ARTHUR ROMERSA, THOMAS RONGA, FRANCO ROTUNDO, ROBERT SCHUMAN AND ANTHONY VESPUCCI,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES J. CORRIGAN, JR., SALVATORE AVELLINO, VITO BIONDO, CHARLES CANNIZZARO, NICHOLAS FERRANTE, PETER FINNERTY, JOHN HAYNES, VINCENT MONTESANO, ARTHUR ROMERSA, THOMAS RONGA, FRANCO ROTUNDO, ROBERT SCHUMAN AND ANTHONY VESPUCCI,

Defendants-Petitioners,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This Brief is submitted in opposition to the defendants' petition for a Writ of Certiorari to the New York State Court of Appeals.

In January and September of 1987, each of the defendants were convicted in County Court, Suffolk County, New York, of various of the following crimes: Coercion in the

First Degree (New York Penal Law §135.65), Attempted Coercion in the First Degree (New York Penal Law §§110, 135.65), Conspiracy in the Fifth and Sixth Degrees (New York Penal Law §§105.00, 105.05), Attempted Bribe Receiving in the Second Degree (New York Penal Law §§110, 200.11), Official Misconduct (New York Penal Law §195.00), Perjury in the First Degree (New York Penal Law §210.15), and Contempt in the First Degree (New York Penal Law §215.51).[1]

These convictions arose out of an investigation conducted by the New York State Organized Crime Task Force (the "Task Force"), which documented the Lucchese and Gambino crime families' control of the carting industry on Long Island, and which included nearly thirteen months of court-authorized electronic surveillance. In September 1984, after the conclusion of the investigation, defendants were charged, along with numerous corporations, in several interrelated indictments with a variety of crimes, including Coercion, Bribery, and Conspiracy to commit those crimes, and violation of New York State's anti-trust statute.

In a written opinion issued on December 30, 1988, the Appellate Division of the New York Supreme Court, First

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[1] Most of the defendants pled guilty and were sentenced on January 12, 1987: Vespucci and Avellino pled to Coercion in the First Degree and Conspiracy in the Fifth Degree; and Rotundo, Ronga, Haynes, Schuman, Cannizzaro, and Montesano pled guilty to Attempted Coercion in the First Degree. Each of these defendants received 5 years probation, community service, and fines ranging from $4000 to $6000. In addition, Corrigan pled guilty to Coercion in the First Degree and two counts of Conspiracy in the Fifth Degree, and was sentenced on September 1, 1987, to concurrent 6 month prison terms and 5 years probation. Romersa and Biondo pled guilty to Attempted Bribe-Receiving in the Second Degree and were sentenced on September 10, 1987, to 6 month prison terms. Romersa also pled guilty to Official Misconduct and received an additional concurrent 6 month term. Both were re-sentenced on April 20, 1990, to serve only weekends in prison for 8 months. Finnerty was convicted after trial of Perjury in the First Degree and two counts of Contempt in the First Degree, and was sentenced on June 17, 1987 to a 6 month prison term and 5 years probation. He was re-sentenced on April 23, 1990 to 5 years probation with one year of electronic monitoring.

Department, unanimously affirmed the defendants' judgments of conviction. People v. Vespucci, 144 A.D.2d 48 (2d Dept. 1988). On February 17, 1989, leave was granted to the defendants to appeal to the New York State Court of Appeals. In a written opinion issued on February 15, 1990, that court also affirmed the judgments of conviction, with one Judge dissenting. People v. Vespucci, 75 N.Y.2d 434 (1990).

Defendant Corrigan thereafter moved before Justice Thurgood Marshall for a stay of execution of his judgment of conviction pending filing and review of this petition for a Writ of Certiorari. On May 17, 1990, Justice Marshall summarily denied Corrigan's motion.

STATUTES INVOLVED AND ISSUE RAISED

Federal law provides that only "[t]he principle prosecuting attorney of a state" or of "any political subdivision thereof" may be authorized by state law to apply for eavesdropping warrants. 18 U.S.C. §2516(2). The New York State Criminal Procedure Law ("CPL") expressly provides that, in addition to the State's Attorney General and the District Attorney of each of its counties, the Director of the Organized Crime Task Force is a proper applicant for eavesdropping warrants when so "authorized by the Attorney General." CPL 700.05(5).

In affirming defendants' judgments of conviction, the New York State Court of Appeals held that this statutory designation of the Director of the Task Force as an eavesdropping applicant is in full conformity with the mandate of 18 U.S.C. §2516(2). The issue defendants raise before this Court is whether the Court of Appeals' holding is correct.

THE OPINIONS BELOW

A. The Appellate Division's Opinion.

In unanimously affirming the defendants' judgments of conviction, the Appellate Division held that the designation of the Director of the Task Force as an eavesdropping applicant conformed to the requirements of federal law. People v. Vespucci, 144 A.D.2d at 50-51. After reviewing the provisions and purposes of the federal law (144 A.D.2d at 51-53), the Appellate Division found that, based on the functions he exercises, the Director of the Task Force is the kind of accountable and centralized public official envisioned by Congress when it mandated that only "principal prosecuting attorneys" could be authorized applicants for eavesdropping. 144 A.D.2d at 53-56.

The Appellate Division also held that the Director is an identifiable public figure, sufficiently responsive to the political process, and thus accountable for his official actions, as also required by federal law. 144 A.D.2d at 55-56. The Court specifically observed that the New York Legislature's purpose in creating the Task Force "parallel[ed], in many respects, those identified as significant by the framers of Title III; principal among them the desirability of ensuring uniformity and centralization of procedure as a means of enhancing the effectiveness of law enforcement personnel in combating organized crime." 144 A.D.2d at 54.

B. The Court of Appeals' Opinion.

In affirming the decision of the Appellate Division, the Court of Appeals also examined the "purpose and function" of the Task Force Director under State law, and held that he was "publicly accountable" as required by the federal statute. People v. Vespucci, 75 N.Y.2d at 439, 440. The Court also found that it would "ironically contradict the centralization objective" of the federal statute to hold that the Director was

not properly designated as an eavesdropping applicant, given that the Task Force's purpose under State law -- to insure centralization in the law enforcement effort against organized crime -- was "remarkably consonant" with the intent underlying the federal statute. 75 N.Y.2d at 439.

In addition, the Court specifically rejected the defense argument that, in enacting 18 U.S.C. §2516(2), Congress had intended to permit only one state official to apply for eavesdropping warrants. 75 N.Y.2d at 438-440. The Court reasoned that this provision was a "generic enabling statute" (75 N.Y.2d at 438), whose purpose is both to provide "'for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance,'" and to ensure that "'[s]hould abuses occur, the lines of responsibility lead to an identifiable person.'" 75 N.Y.2d at 439, 440, quoting Senate Report No. 1079, 90th Cong. 2d Sess., 1968, reprinted in 1968 U.S. Code Cong. & Admin. News at 2187, 2185. The Court concluded that the federal statute allowed for a "limited, high-level roster of applicants" when these Congressional concerns are met. 75 N.Y.2d at 439.

The Court also stressed that "under New York's unconventional scheme" the "Attorney General is not traditionally or by statutory empowerment a general prosecuting official;" and thus rejected the argument of the dissenting judge that allowing both the Attorney General and the Task Force Director to be applicants was "duplicative[]." Id. at 441.

Finally, the Court also rejected the argument that the New York State Attorney General's "blanket" authorization for the Director of the Task Force to act as an eavesdropping applicant -- as opposed to a specific authorization limited to a particular warrant -- constituted an "overbroad delegation" from the Attorney General. 75 N.Y.2d at 440-441. The Court found, in fact, that this authorization was not a delegation at all, since the Director's applicant authority, like his general investigative and prosecutorial powers, are not "derived" from the Attorney General's, but are "separately secured through a State legislative grant." 75 N.Y.2d at 441.

ARGUMENT

THE PETITION SHOULD BE DENIED: THE OPINION OF THE NEW YORK COURT OF APPEALS IS CLEARLY CORRECT; THE STATE AND FEDERAL CASES INTERPRETING 18 U.S.C. §2516(2) ARE IN HARMONY WITH THAT OPINION; AND THE ISSUE RAISED BY PETITIONERS IS NOT ONE OF NATIONAL IMPORTANCE.

A. Summary of Argument.

The defendants' petition should be denied. First, as the Court of Appeals correctly held, 18 U.S.C. §2516(2) is a "generic enabling statute" designed to centralize the authority to seek eavesdropping warrants in identifiable and accountable public officials. Because Congress was faced with 50 different states with potentially 50 different ways of allocating prosecutorial power in passing the statute, it left as a matter of state law which state officials might be designated as an eavesdropping applicant. Moreover, Congress did not forbid, and thus implicitly allowed, for designation of more than one applicant at the state or local level, so long as the Congressional concern for centralization and accountability was respected.

Under New York law, the Director of the Task Force is a publicly accountable government official who has the specific legislative mandate to conduct and co-ordinate the State's investigative and prosecutorial efforts against organized crime. He is thus precisely the type of public official Congress intended could be an eavesdropping applicant. The Court of Appeals therefore correctly found that his designation was in conformity with federal law.

Second, the opinion of the Court of Appeals is in harmony with those in other jurisdictions, and in no way conflicts

with the various state and federal cases cited by defendants which also interpret 18 U.S.C. §2516(2). Those cases do reach varying ultimate conclusions as to the propriety of the designation of the state applicants under consideration. This is not, however, because they rely on fundamentally different interpretations of federal law, but rather because they consistently applied the statute to different allocations of applicant authority, resulting in differing determinations of whether the Congressional policy set forth in that statute was being respected in each case. Thus, while the Congressional concern that applicant authority be centralized in high level accountability officials was not satisfied when state law permitted the unchecked delegation of an applicant's authority to one of a number of unspecified assistants (see, e.g., State v. Farha, 218 Kan. 394, 544 P.2d 341 [1975], cert. denied Kansas v. Farha, 426 U.S. 949[1976]), it was satisfied when the delegation was so circumscribed that the applicant had to personally review and approve each application by his designated subordinates. See United States v. Smith, 726 F.2d 852 (1st Cir. 1984); Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975). Alternatively, the Congressional concern is satisfied when, as here, there is no delegation at all, but instead two high-level officials are designated as applicants in their own right, each of whom is publicly responsible for his decisions and actions. See also United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Domme, 753 F.2d 950 (11th Cir. 1985).

Finally, even if the Court desired to review the issue of when a state may designate more than one eavesdropping applicant at the state-wide level, this would be an inappropriate case in which to do so, given that it presents the issue in the context of the Task Force's unique jurisdiction and relationship under state law to the Attorney General, which is unlike that of any other public official in the country. See New York Executive Law §70-a (the Task Force's enabling legislation); People v. Vespucci, 75 N.Y.2d at 441.

B. The Opinion of the Court of Appeals was Correctly Decided.

First, the opinion of the Court of Appeals was correctly decided. Indeed, every state and federal court to address the propriety of the designation of the Task Force Director as an eavesdropping applicant has held that it is in conformity with the controlling federal statute, 18 U.S.C. §2516(2). People v. Vespucci, 144 A.D.2d 48 (2d Dept. 1988); People v. Sepulveda, A.D.2d (1st Dept. 1989) (affirming with no opinion), lv. denied, 150 A.D.2d 991 (1989); United States v. Vario, et al., (CR 88-001719, May 3, 1989, E.D.N.Y.).

1. Federal Law Allows for More Than One Applicant.

Defendants nonetheless argue that the Court of Appeals' opinion incorrectly interprets section 2516(2) as allowing, under limited circumstances, more than one eavesdropping applicant at a state-wide level. Specifically, defendants maintain that because the section provides only that "the" principal prosecuting attorney of the state may be so designated, not "a" or "any" prosecuting attorney, Congress meant to prohibit the states from conferring eavesdropping authority on more than one official (Defendants' Petition at 8-12, 21). Congress, however, clearly intended the phrase "the principal prosecuting attorney" to be construed generically, and it neither said nor meant that only one official at the state level could be so designated.

The federal eavesdropping statute is based on the policy announced by Congress that authority to apply for warrants be "centralize[d] in a publicly responsible official subject to the political process," thereby avoiding the "possibility that divergent [eavesdropping] practices might develop," and ensuring that "[s]hould abuses occur, the lines of responsibility lead to an identifiable person." Senate Report No. 1079, 90th Cong. 2d

Sess., 1968, reprinted in 1968 U.S. Code Cong. & Admin. News p. 2185. At the federal level, Congress "easily implemented" this policy by specifying in 18 U.S.C. §2516(1) those officials within the Department of Justice who may apply for warrants. See United States v. Giordano, 416 U.S. 505, 523 (1974). Such specificity was impossible with the States, however. As one court has explained, Congress was faced in enacting Section 2516(2) with "fifty state statutory schemes for parceling out the state's law enforcement powers." United States v. Lanza, 341 F.Supp. 405 (M.D. Fla. 1972). Thus, Congress more generally required in 18 U.S.C. §2516(2) that "[t]he principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof" may apply for an eavesdropping warrant, if "authorized by a statute of that State." 18 U.S.C. §2516(2). As a result, the section must be broadly "construed so as to permit each state to fit its scheme into the framework of the federal statute even though the distribution of power or the names of the officers may differ from state to state." United States v. Lanza, supra.

The commentary to Section 2516(2) contained in the Senate Report to the Omnibus Crime Control and Safe Streets Act includes a "comprehensive and in-depth analysis" of Title III designed "to make explicit congressional intent." 1968 U.S. Code Cong. & Admin. News p. 2177. The commentary stresses that who the principal prosecuting attorneys of a state are is "a question of State law," for which federal law requires only that respect be given to the announced Congressional policy that applicant authority be centralized in an accountable figure. Moreover, Congress made clear that in making this determination, "[t]he important question ... is not name but function." Id. at 2187.

In short, Congress intended the phrase "principal prosecuting attorney" to be interpreted broadly, so that the States would have wide latitude to decide, as a matter of their own law, who are their principal prosecuting attorneys. As the Appellate Division pointed out below, an "insistence upon a literal construction of the phrase 'principal prosecuting attorney'

unduly circumscribes its application and fails to meaningfully incorporate as guiding criteria the policy objectives sought to be achieved by Congress in utilizing the statutory term." People v. Vespucci, 144 A.D.2d at 55.

In this regard, the word "the" before "principal prosecuting attorney" merely reflects an expectation that, in the usual case, there would generally be one applicant for each political subdivision of the state. Defendants defy logic by stretching the use of these three letters into an expression of Congressional intent to require that there be only one principal prosecuting attorney. As the federal Rules of Construction state, "words importing the singular include and apply to several persons, parties, or things..." 1 U.S.C. §1.

Clearly, Congress believed that centralizing eavesdropping authority -- both federally and among the states -- in a publicly identifiable official "should go a long way toward guaranteeing that no abuses will happen." 1968 U.S. Code Cong. & Admin. News, p. 2185. Achieving such centralization and accountability, however, does not require that such eavesdropping authority be exercised by only one official. Federally, of course, there are a plethora of authorized applicants specified by Congress in 18 U.S.C. §2516(1); and -- absent a clear expression of Congressional intent to the contrary -- there is no reason that also having more than one applicant at the state level necessarily violates federal law.

Obviously, if there are many authorized applicants at the state level, then centralization and accountability may be diluted; and, as a result, the federal policy that applicant authority be centralized in an accountable public figure may be violated. This, however, is not such a case. As discussed more fully below, besides the Attorney General, the Task Force Director is the only other state official authorized to apply for eavesdropping warrants; and it is the Director who is charged, by statute, with conducting the statewide battle against organized crime -- one of the central purpose for which Congress intended eavesdropping to be used. Moreover, to whatever extent the existence of even two applicants at the state level might permit

divergence of policy regarding eavesdropping, or a diffusion of responsibility for it, the Attorney General's statutory right to grant, or withhold, the Director's "applicant" authority under CPL 700.05[5] provides a mechanism for ensuring that uniformity and accountability are maintained.

Defendant, however, notes that when Congress recently amended 18 U.S.C. §2516(1) to increase the number of federal officials within the Justice Department who could apply for eavesdropping warrants, it failed at the same time to also "broaden" 18 U.S.C. §2516(2) to allow more State officials to apply for warrants (Defendants' Petition at 13-16). He argues that this "failure" reflects a Congressional intent to strictly construe 2516(2), and somehow constitutes Congressional approval of those State and federal cases, decided prior to the amendments to Section 2516(1), which strictly limit when a principal prosecuting attorney of a State may delegate his authority to apply for warrants to his subordinates. See, e.g., United States v. Smith, 726 F.2d 852 (1st Cir. 1984); State v. Frink, 296 Minn. 57, 206 N.W.2d 664 (1973); State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, Kansas v. Farha, 426 U.S. 949 (1976); Poore v. State, 39 Md. App. 44, 384 A.2d 103 (Ct of Special Appeals 1978).

Congress' expansion of the number of federal applicants in 2516(1), however, reflected Congress' conclusion that the designation of multiple high-level officials applicants in no way undermined the objective to centralize applicant authority in accountable officials. Notably, when Congress amended 18 U.S.C. §2516(1) in 1984 to add to the list of Justice Department officials who could be authorized to apply for eavesdropping warrants, it declared that such an expansion of the list merely permits "a broader sharing of the burden for reviewing potential surveillance cases, thereby promoting a more thorough consideration without diminishing the congressional intent to have a politically responsible high official personally approve surveillance applications ..." 1984 U.S. Code Cong. & Admin. News, p. 3535.

In light of this clear Congressional declaration that applicant authority can be given to a number of high-level officials without undermining its centralization policy, the Court of Appeals correctly interpreted the meaning of the phrase "principal prosecuting attorney" in 18 U.S.C. §2516(2) when it concluded that Congress "did not intend [a] straight-jacketed implementation of this important legislation," and that the designation of both the Attorney General and the Director of the Task Force as eavesdropping applicants is thus permissible. People v. Vespucci, 75 N.Y.2d at 439.

2. Under State Law, the Director Was Properly Designated as an Eavesdropping Applicant.

The Court of Appeals also properly found, based on an examination of the Director's function and "unique" relationship with the Attorney General under State law, that the Director was the type of centralized and accountable public official Congress intended could be an applicant.

First, the Court noted that the Director of the Task Force is an identifiable and accountable public figure. Indeed, he is not one of many unspecified assistant or deputy attorneys general; instead, his position was uniquely and explicitly established by the State Legislature in New York Executive Law §70-a, which provides that he is a joint appointee of the Governor and the Attorney General, and may be removed by them jointly. His status as an eavesdropping applicant is also specifically authorized by statute, and is further conditioned on authorization from the State Attorney General (CPL 700.05[5]), exactly as the applicant status of the federal Assistant Attorneys General is contingent, by statute, on prior authorization from the U.S. Attorney General. 18 U.S.C. §2516(2).

As a result, should abuses occur in the eavesdropping practices of the Task Force, the responsibility of the Director would be clear and remedies would exist within the political process: the Attorney General could withdraw authorization for the Director to apply for eavesdropping

warrants; the Governor and the Attorney General could remove him from office; or the Legislature itself could remove him from the list of designated applicants in CPL 700.05(5). Defendants are thus entirely without basis when they assert that the Director is an "unchecked" and "legally anonymous" official (Defendants' Petition at 21, 23).

Second, and contrary to defendants' assertion (Defendants' Petition at 17, 23), the designation of both the Director of the Task Force and the State Attorney General as eavesdropping applicants does not in any way "destroy[]" or "shatter" the Congressional intent to centralize in high level public figures the decision to seek authorization to conduct eavesdropping. To the contrary, as the Court of Appeals noted below, the Director's broad powers and responsibilities "insure centralization and consistency in the law enforcement effort against organized crime," the very effort for which court-ordered eavesdropping was explicitly designed. People v. Vespucci, 75 N.Y.2d at 440.

Specifically, the Legislative findings in support of Executive Law §70-a state that "an overly fragmented, uncoordinated approach" to organized crime control by local law enforcement agencies, which have "limited resources and restricted geographical jurisdiction," had been inadequate to successfully deal with the problem of organized crime in the state. N.Y.S Legis. Findings, L.1970, c. 1003, §1, reprinted in McKinney's Cons. Laws of New York, Executive Law §70-a, Book 18, p.143 (West. 1982). The Legislature thus created the Task Force and gave it -- and only it -- statewide jurisdiction to investigate and prosecute organized crime cases that cross county or state lines (Executive Law §70-a[1][a]), as well as a mandate to assist local prosecutors in their own organized crime efforts. Executive Law §70-a(1)(b). As a result, the Task Force can commence and maintain a "concerted and concentrated investigative and prosecutive effort to break the structure and power of organized crime." L.1970, c. 1003, §1. As the Appellate Division noted below, these findings "parallel, in many respects, those identified as significant by the framers of Title

III" regarding "the desirability of ensuring uniformity and centralization of" the law enforcement effort against organized crime. People v. Vespucci, 144 A.D.2d at 54.

Indeed, the one and only purpose of the Task Force is also "[t]he major purpose of Title III," that is, to "combat organized crime." 1968 U.S. Code Cong. & Admin. News p. 2157. As the Congressional findings in support of Title III explicitly state, electronic surveillance is "an indispensable aid" to the successful investigation and prosecution of organized crime (Id. p. 253, Public Law 90-351, §801[c]), which extracts an enormous economic, social, personal and political cost from our society. Id. at 2157-2159. Congress also noted in enacting Title III that New York faced one of the most aggravated organized crime problems in the nation. Id. at 2159. The Legislative Findings to Executive Law §70-a -- the Task Force's enabling legislation -- detail the exact same "corrosive influence" of organized crime activities on the life of the state;[2] and the New York eavesdropping statute was also explicitly enacted to provide law enforcement with what was recognized as the perhaps "most single effective weapon" against organized crime. 1968 McKinney's Session Laws, p. 3277 (Governor's Memorandum); see also People v. Vespucci, 144 A.D.2d at 52-53.

In short, the Director is the principal prosecuting attorney for organized crime statewide. Defendants are simply wrong when the assert that, as a matter of state law and practice, only the Attorney General is the principal prosecuting attorney (Defendants' Petition at 4, 27). The Director's "general authority" to investigate and prosecute organized crime and his "independent wiretap authority" are given directly to him by the Legislature, and not to the Attorney General, who is not even

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[2] Specifically, the Findings note that organized crime involves "the corruption of public officials, . . . draws millions of dollars from the state's economy, . . . corrupt[s] a variety of legitimate businesses and labor unions, which undermines free competition by coercive tactics, and which threatens the peace, security and general welfare of the people of the state." L. 1970 c. 1003, §1.

a "general prosecuting official" under New York law. People v. Vespucci, 75 N.Y.2d at 441. For instance, and despite defendants' assertion to the contrary, in 1988 the Task Force Director conducted all of the court-authorized eavesdropping on the state-wide level, and the Attorney General conducted none.[3]

Although Congress obviously could not have envisioned the precise, and rather complex, statutory scheme that created the Task Force (See Executive Law §70-a), given the Director's centralized and unique state-wide responsibility for the investigation and prosecution of organized crime, he is clearly the type of official that Congress envisioned as an authorized applicant. With his mandate to conduct his own prosecutions and investigations of organized crime statewide, as well as to assist local prosecutors, the Director is in fact better situated than any other official (including the Attorney General) to "avoid the possibility that divergent [eavesdropping] practices might develop" throughout the state. 1968 U.S. Code & Cong. Admin. News, p. 2185.

It would be ironic, indeed, if the head of the only agency with statewide responsibility for the investigation and prosecution of organized crime could have no ability to apply directly for eavesdropping warrants, which both Congress and the state have found to be so indispensable to the fight against organized crime.

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[3] Defendants' reliance on the federal eavesdropping Reports to argue that the Attorney General applied for 28 wiretap orders in 1988, while the Task Force Director applied for none, is based on a misreading of those Reports (Defendants' Petition at 27, n.42; Appendix at 66). In fact, it was the Director who actually applied for, obtained, and executed every one of these orders. Pursuant to CPL 700.05(5), the Attorney General merely gave his blanket authorization for these applications, and was for this reason listed by the Task Force and the issuing justices in their submissions to the Administrative Office of the U.S. Courts as the "authorizing official" in the federal Reports.

C. The Opinion of the Court of Appeals is in Harmony With Those in Other Jurisdictions.

The Court of Appeals' opinion is also not in "conflict with the decision of another state court of last resort or of a federal court of appeals" (U.S. S.Ct. Rule 17.1 [c]); and is in fact fully consistent with those few federal decisions which have addressed a similar issue. See United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Domme, 753 F.2d 950 (11th Cir. 1985); United States v. Lanza, 341 F.Supp 405 (M.D. Fla. 1972).

Defendant, however, argues that there is a proliferation of competing interpretations of the meaning and import of 18 U.S.C. §2516(2) that reflects a split of opinion between two Circuits and various State courts (Defendants' Petition at 16-25). In so arguing, they identify four groups of cases that they claim represent several different "schools of thought." Two of these groups include those cases, some of which were cited above, that review the propriety of a delegation from a statutorily designated State eavesdropping applicant to one of his legislatively unspecified subordinates; a third group includes only the Fifth Circuit decision in United States v. Pacheco, 489 F.2d 554, supra, which upheld the designation of the Governor of Florida as an applicant, even though the State Attorney General was also designated as one; and the final group includes only the State Court of Appeals' decision below (Defendants' Petition at 18-21). In fact, the holdings of these cases are in harmony with each other and with the Court of Appeals' holding in this case.

There is, of course, no conflict between this case and the two groups of cases identified by defendants which strictly interpret when a principal prosecuting attorney can delegate his applicant authority to his subordinates. These delegation cases hold either that true delegation in such situations is improper or that delegation is proper only when it is a delegation in form only, and in substance the authority of the "delegating" official is exercised by that official himself.

United States v. Smith, 726 F.2d 852 (1st Cir. 1984); State v. Frink, 296 Minn. 57, 206 N.W.2d 664 (1973); State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, 426 U.S. 949 (1976); Poore v. State, 39 Md. App. 44, 384 A.2d 103 (Ct of Special Appeals 1978); State v. Cocuzza, 123 N.J. Super. 14, 301 A.2d 204 (1973). This case, by contrast, involves no delegation in form or substance. Instead, as noted above, and as the Court of Appeals below specifically held, the applicant authority of the Task Force Director was conferred directly upon him by statute and was not delegated to him by the State Attorney General. People v. Vespucci, 75 N.Y.2d at 441. The group of delegation cases defendants cite thus simply have no relation to, and are in no way inconsistent with, this case.

Moreover, the similarity between this case and Pacheco, the sole representative of defendants' third group of cases, is striking. Specifically, in Pacheco, the Fifth Circuit held that the Governor of Florida -- who is not even a prosecutor, and thus much less literally a "principal prosecuting attorney" -- was properly designated, along with the State Attorney General, as an eavesdropping applicant under Florida law. The Court held that the Governor's designation "comports fully with the federal requirements" by ensuring "the centralization of policy decisions [concerning the use of eavesdropping] at the highest practicable levels, preferably on a statewide basis." United States v. Pacheco, 489 F.2d at 562. That the Florida Legislature made both the Governor and the Attorney General authorized applicants on a statewide basis, and even though the Governor did not fit, in fact, within a restrictive reading of the phrase "principal prosecuting attorney," was not fatal to the Florida statute. See also United States v. Lanza, 341 F.Supp 405 (M.D. Fla. 1972). Similarly, ten years after Pacheco, the Attorney General of Florida was also held to be a properly designated applicant for eavesdropping warrants, even though he is accountable under Florida law to the Governor, who under the holding of Pacheco is himself a properly designated eavesdropping applicant. United States v. Domme, 753 F.2d 950 (11th Cir. 1985).

Far from representing a fragmentation in the law among federal and state courts, as defendants assert, the Florida decisions and this case present a consistent interpretation of Congress's intent to limit applicant authority to "the principal prosecuting attorney" of a state. All of these cases make clear that more than one state official may be designated as an eavesdropping applicant, so long as each official can be said to satisfy the Congressional requirement that applicant authority be centralized in publicly identifiable, high-level officials.

Similarly, the difference in outcome between the delegation cases on the one hand, and the Florida cases and this case on the other, arise not because they employ a fundamentally different interpretation of federal law, but because of the differing nature of the positions held by the officials exercising applicant authority in each case. The delegation cases defendant cites involved the unchecked delegation by an applicant to one of a number of unspecified assistants. See, e.g., State v. Farha, supra. While the question of how applicant authority may be delegated is as much a question of state law as is the question of who are the principal prosecuting attorneys of a State (1968 U.S. Code Cong. & Admin. News p. 2187), such delegation (like the designation of the State's prosecuting attorney) must conform to the Congressional requirement that eavesdropping applicants be high-level and accountable public officials. Because actual delegation to any of a large number of unspecified assistants would violate this policy, the delegation cases find in federal law a limitation upon such delegation, permitting it only in those circumstances in which the statutorily specified applicant personally reviews and approves the application -- that is, only when the applicant all but makes the application himself. See e.g., United States v. Smith, supra; Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975).

The restrictive interpretation in these delegation cases, however, is neither required for, nor inconsistent with, the Florida cases and this case, where instead of a delegation from a specified high-level official to an unspecified and low-level one, there is instead a direct statutory grant of authority to two high-

level officials, each of whom are readily identifiable and publicly accountable for their decisions and actions.

In short, the case law hardly reflects a "fragmentation" of the law or the existence of competing "schools of thought," but rather the consistent application of a single set of legal principles to different factual predicates. Defendants' dire warnings -- that a lack of guidance from this Court in how to interpret the federal provisions has allowed a "chaotic situation to develop" and that "[t]he entire congressional scheme is in immediate danger of unraveling" (Defendants' Petition at 6, 7) -- are without foundation.

D. The Opinion of the Court of Appeals Presents No Question of National Importance Justifying Review By The Court.

Finally, the Court of Appeals' opinion in this case presents no "important question of federal law which has not been, but should be, settled by" the Supreme Court, so as to justify granting a Writ of Certiorari. U.S. S.Ct. Rule 17.1(b). The abstract federal issue presented -- when can a State name two officials as "principal prosecuting attorneys" who may apply for eavesdropping warrants -- is one of narrow import. Although the related issue of when a properly designated State applicant may delegate his authority to a subordinate has been more widely litigated, the issue in this case has been litigated only in the Pacheco and Domme cases in Florida, and now in this case in New York. Notably, Certiorari was denied previously in the Pacheco case (421 U.S. 909 [1975]), and was denied even in one of the delegation cases (State v. Farha, 218 Kan. 394, 544 P.2d 341 [1975]).

Moreover, even if the issue were worthy of Supreme Court review, this would be an inappropriate case for it. As the State Court of Appeals noted, "under New York's unconventional scheme," the Attorney General is not even "traditionally or by statutory empowerment a general prosecuting official." People v. Vespucci, 75 N.Y.2d at 441. The position of

the Task Force Director, and his relationship to the Attorney General and other State and local officials are thus unlike that of any other public official in the country. Specifically, although the Director is denominated in the State's Executive Law a "Deputy Attorney General," he is in fact a joint appointee of both the Attorney General and the Governor, and can be removed only with the concurrence of both officials. Broad powers to conduct and coordinate the State's investigative and prosecutorial efforts against organized crime are given directly to him, rather than to the Attorney General, by legislative grant. Indeed, he appears in the grand jury and prosecutes a case with the approval of the Governor and the local District Attorney, and not that of the Attorney General. Once he receives that approval, he then supersedes the District Attorney and is given all of the District Attorney's powers, duties and responsibilities as to that case. Executive Law §70-a(7). No other State assigns statewide prosecutorial responsibilities in a similar manner.

Review by the Supreme Court in this case would, of necessity, require making determinations as to New York State's "unconventional" allocation of power and responsibility between the Task Force Director and the Attorney General (indeed, it would require resolving the very sort of issues Congress meant in Title III to leave as questions of state law), and would thus likely have little or no application to other jurisdictions in the nation.

CONCLUSION

The Petition for a Writ of Certiorari to the New York State Court of Appeals should be denied.

Respectfully submitted,

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